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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1970

No. ~~1709~~ 70-170

KEITH MILTON RHINEHART, *Petitioner,*

v.

B. J. RHAY, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT

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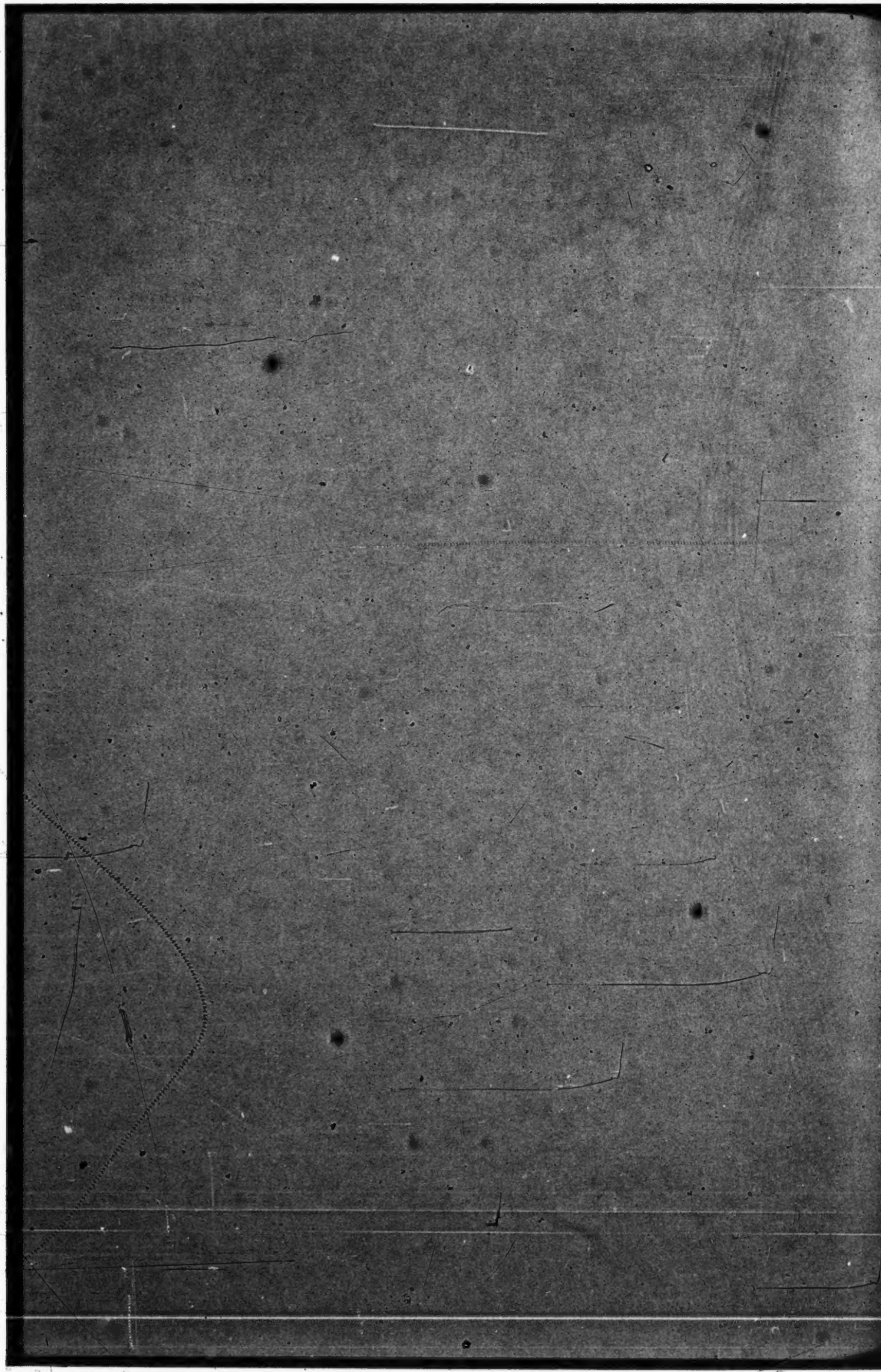

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BRIEF OF RESPONDENT

I

STATEMENT OF THE CASE

Pursuant to Rules of the Supreme Court, Rule 40, 3, respondent does make a counter statement of the case for the purpose of enhancing clarity of the circumstances of this case, and in order to provide a coherent chronology of the facts involved. A succinct summary of the factual background of this

case is contained in the Opinion of the Ninth Circuit Court of Appeals, being Rhinehart v. Rhay, Nos. 26301 and 26098, decided on March 11, 1971, the full text of which is printed in petitioner's Appendix A, pgs. A-1 to A-19, and attached to his Petition for Writ of Certiorari herein, but for more ready reference, the language of that opinion as to said factual statement is herewith quoted verbatim as the same appears on pages A-2 to A-7:

> Because of the peculiar history of the case and our conclusion to reverse, a somewhat lengthy recital of facts is necessary.
>
> Petitioner Rhinehart was convicted in December 1965, on a state charge of sodomy. The state's principal witnesses were James Miller and Seattle Police Officer William R. Von Allmen. Miller was then 16 years old and had had previous difficulties with the state juvenile authorities.
>
> He testified that he and two friends were standing on a street corner in downtown Seattle shortly after 1:00 a.m. on April 11, 1965. A light colored convertible automobile stopped across the street and its driver sounded the horn at them. Miller walked to the car and the driver, Rhinehart, initially indicated that he had mistaken Miller for someone else. He then asked Miller if he would like to make some money. Receiving an affirmative response, Rhinehart drove them to Rhinehart's apartment where Miller testified that an act of oral sodomy took place. Miller subsequently described in some de-

tail the interior and exterior of Rhinehart's apartment.

Miller testified that Rhinehart gave him $15 in currency and drove him to the business district where Miller rejoined his friends. Rhinehart wrote his phone number on a piece of paper and told Miller to call any time he wanted to earn more money.

Miller testified that he rejoined his friends at 1:30 a.m. and went to the home of one of them to get some more money. They went back down town and "goofed around all night." When asked for more details, Miller said they had spent most of their time in "a corner restaurant", the name of which he was unable to recall.

Some time later that morning, Miller and his friends were seen by Seattle police officers standing next to a parked car. At that time, approximately 11:00 a.m., they were taken in hand for suspicion of car prowling. Since he was 16 at the time, Miller was taken to the King County Youth Center and detained there over night.

The next morning he appeared before a Juvenile Court judge who determined that the evidence against him was insufficient and dropped the charges relating to the car prowling. Miller was not, however, released at that time because the juvenile authorities indicated to the court that Miller's mother was unable to control him and that he should remain at the Youth Center until proper home placement could be arranged. On April 15, Miller was released following arrangements for other living

quarters, and a formal order dismissing the charges was signed on April 22.

On April 13, following dismissal of the charges but while Miller was awaiting release from the Youth Center, he was visited by Officer Von Allmen. The officer inquired about his contact with Rhinehart the night before he was arrested. Miller said he didn't know for sure how Von Allmen heard about it but guessed the other two boys must have told him. Miller gave the facts and signed a statement which Von Allmen first prepared and reviewed with him.

The charge of sodomy was then filed against Rhinehart. Miller was subsequently released from the Youth Center and prior to trial was visited by a Mrs. Lemmon who was a friend of Rhinehart's and from time to time had attended services at the Aquarian Church where Rhinehart was an ordained minister.

After meeting Mrs. Lemmon, Miller went to the office of Rhinehart's trial counsel and signed a second statement, in which he said. "There was no sexual act of any description between Rev. Rhinehart and myself." He added that the police had influenced him to sign the original statement because "they were really out to get Rhinehart and they needed a statement from me to help them." He added that he had "met Rev. Rhinehart and he had taken me to his home where I had confided my problems to him and he had tried to help me."

Following his contact with Mrs. Lemmon and his new statement but still prior to the trial, Miller signed a third statement which repeated

the incident as he had originally reported it to the police. He repudiated the statement given to Rhinehart's attorney and explained that it had been given because he was anxious to leave Seattle and Mrs. Lemmon had promised him a ticket to Alaska if he would copy a statement she had prepared and sign it.

He said he was later told that he would not get the ticket but instead that she would buy him new clothes. He indicated that she had bought him $80 worth of clothing and she testified to the same effect, adding that she had done so for humanitarian reasons and that it had nothing to do with Miller's statement. Miller also said that Mrs. Lemmon had given him money at that time and on one additional occasion, a fact which Mrs. Lemmon also confirmed in her testimony.

Rhinehart testified to his version of the incident with Miller. He said that he had stopped and sounded his horn, thinking that Miller was the son of a member of his congregation. Learning his error, he told Miller but the boy expressed an interest in Rhinehart's car and asked for a ride. Rhinehart agreed.

As they were driving the boy told Rhinehart that he would permit Rhinehart to perform homosexual activity on him for a price. Rhinehart said he declined and told Miller that he was a minister and, though he knew many homosexuals, was not so inclined himself. He denied that Miller had been to his apartment for either sexual or counseling reasons.

The defense version therefore was that Miller was a male prostitute who had made unsuccess-

ful advances at Rhinehart. When Officer Von Allmen testified he was asked if he knew of any incidents of Miller "hustling" homosexuals and he replied that he did not.

To support this theory, the defense called a witness who testified that he had been approached by Miller, some time after the Rhinehart incident, at a homosexual rendezvous where Miller expressed willingness to engage in deviant conduct for a price.

The defense sought to show that Rhinehart had been singled out for prosecution because of his association with the Aquarian Foundation which advocates sexual freedom and because of his recent appearance on a television show with homosexuals and an interracial married couple.

In furtherance of this theory, the defense offered to prove the existence of other local homosexual gathering places where overt acts of homosexuality took place under the approving eyes of Seattle police officers. The offer of proof was rejected and is the basis of Rhinehart's cross-appeal, discussed in Section V, *infra*.

Rhinehart's conviction was appealed to the Washington Supreme Court which unanimously affirmed and subsequently denied a petition for rehearing. *State v. Rhinehart*, 70 Wash.2d 649, 424 P.2d 906 (1967). His petition for *certiorari* was denied by the Supreme Court. *Rhinehart v. Washington*, 389 U.S. 832 (1967).

After his incarceration in the Washington State Penitentiary, Rhinehart filed a petition for writ of *habeas corpus* in the federal district court. That petition was denied without hear-

ing and his appeal to this court resulted in a remand to the district court directing a hearing on the questions of equal protection and alleged use of perjured testimony. *Rhinehart v. Rhay*, 409 F.2d 208 (9th Cir. 1969).

After the remand, the district court heard detailed testimony on the circumstances of Rhinehart's trial and the several statements of Miller. The court concluded that Rhinehart's claimed denial of equal protection was without merit but ruled that he be retried or released within 60 days because his "conviction was obtained in violation of the due process clause of the United States Constitution in that he was convicted of a crime by a trial in a State court in which material evidence in the possession of the State was withheld from him and therefore was suppressed."

The district court went on to point out that, in its view of the evidence, "[s]uch suppression, although unwitting and unintentional insofar as the prosecutor was concerned, was a 'knowing' suppression in the sense required by the due process clause and the cases decided thereunder, such as *Giles v. Maryland*, 386 U.S. 71, 87 S. Ct. 793 (1967)."

Rhay appealed and Rhinehart has filed a cross-appeal objecting to the district court's refusal to hear evidence concerning his equal protection claim.

As disclosed by this Ninth Circuit Court Opinion, that Court reversed the District Court's vacation of petitioner's conviction on the knowing use of false testimony issue and affirmed the District

Court in all other respects. Thereafter the Ninth Circuit Court denied petitioner his Petition for Rehearing and rejected the suggestion of petitioner for a rehearing en banc (see Petition for Writ of Certiorari Appendix B, p. A-24).

As pointed out on pgs. 6 and 7 of the Ninth Circuit Court Opinion (see Petition for Writ of Certiorari, Appendix A, pgs. A-7 to A-10), the various statements given by the witness Miller are set forth in detail, and include a fourth and fifth statement in addition to those enumerated in the Circuit Court's factual background above quoted.

The fourth statement, denying the act, was given to petitioner's present attorney on September 26, 1966, and was subsequent to his conviction but was during the pendency of the appeal proceedings to the Washington State Supreme Court. It was this fourth statement which the first Ninth Circuit Court Opinion characterized as the "latest retraction" that formed the basis of the remand to the District Court (see Rhinehart v. Rhay, 409 F.2d 208 (9th Cir. 1969)).

Then, on October 28, 1969, witness Miller gave a fifth statement confirming the act. This statement was given to two members of the staff of the Washington State Attorney General following the remand to the District Court, and at a time when Miller was in an Oregon State correctional institution. Miller reaffirmed his trial testimony and the statements he

had given to the Seattle Police Department, that is, the first statement of April 13, 1965, and the third statement of June 11, 1965.

The Ninth Circuit Court, at this point in its Opinion, concluded as follows:

> At this point in the proceedings, we believe that the record before the District Court, by stipulation of counsel, was such that further inquiry was unnecessary and that any doubt created by Miller's 1966 statement was dispelled.[6] On this basis alone we believe that the record fails to show either perjured testimony or knowing use by the state and that Rhinehart's writ of habeas corpus should have been denied.

(See Petition for Certiorari Appendix, p. A-10)

In its footnote 6, the Ninth Circuit observed as follows (see p. 8, of the Opinion and Petition for Writ of Certiorari, Appendix A, pgs. A-17 to A-18):

> [6]In view of Miller's numerous statements alternately affirming and denying the sexual act we think it difficult to speak of "truth" in the abstract sense. We would first note, however, that Miller had once retracted his statement prior to trial and that the jury was informed of that retraction when it rendered its verdict of guilty. In many respects, the record is not significantly different than it was when the question of Miller's veracity was presented to the jury. That is, his latest statement affirms the act in question and explains why previous statements denying it were given. Further, we think it significant to note that all three statements confirming the

incident are not only consistent with one another but also consistent with his trial testimony. The two statements denying it are inconsistent with each other in that the first stated that Miller had been to Rhinehart's home for counseling whereas the second, consistent with Rhinehart's trial testimony, denied his having been there for any reason. Finally, we note that Miller has indicated why he gave each of the two statements denying the incident.

Petitioner, in a footnote on page 29 of his Petition for Writ of Certiorari and Brief, makes reference to certain materials filed by petitioner in the Ninth Circuit Court after the opinion was rendered but before the decision of that Court denying the Petition for Rehearing. As indicated in that footnote, "Respondent has filed an affidavit contradicting Miller's version of this meeting." The affidavit referred to is one executed by Darrell E. Lee, a King County Deputy Prosecuting Attorney assigned to the retrial of the case, and was prepared by him and submitted to counsel for the respondent shortly after the meeting with Miller in May of 1970.[1] This affida-

---

[1]The body of said affidavit reads as follows:

Darrell E. Lee being duly sworn on oath deposes and says:

That he is a King County deputy prosesuting attorney and is assigned to the case of *State v. Keith Milton Rhinehart;*

That in preparation of said case for trial he has had occasion to interview James Miller and talk with Landon Estep, a Seattle attorney;

That during the first interview with James Miller in early May, 1970, your affiant was told by said Miller that he would lie to protect Keith Milton Rhinehart because said Rhinehart had already spent too much time in jail;

vit clearly reflects that once again Miller reiterated that the testimony given by him at the original trial was true, and that the statement he gave to Steve Way of the Washington Attorney General's office was true (this was the fifth statement of October 28, 1969, above referred to), and again confirmed that the act had been performed upon him by the petitioner. As shown by said affidavit the witness Miller had retained an attorney, Landon Estep, who

---

That during the second interview with said Miller one week later, said Miller reiterated to your affiant that the testimony given by him at the original trial was true, that the affidavit he gave last fall to Steve Way of the Washington Attorney General's office was true, and that Keith Milton Rhinehart had performed oral sodomy upon him in 1965; he further told your affiant that he would leave the jurisdiction of the court, refuse to testify, claim he didn't remember the facts or simply lie to protect Keith Milton Rhinehart;

That on both occasions said Miller told your affiant that he has had contact with the defendant Rhinehart and on the second meeting told your affiant that he has continued his contact with said Rhinehart, has had a meeting with Rhinehart's attorney Malcolm Edwards and has employed an attorney to represent him in his dealings with this office;

That on May 8, 1970, Landon Estep called your affiant and stated that he was the attorney for James Miller and agreed with your affiant to appear with James Miller in the office of your affiant on May 14, 1970, for the purpose of taking an affidavit from said Miller;

That on May 20, 1970, said Landon Estep appeared at the office of your affiant and stated that he was unable to locate James Miller and he had been informed that Miller left town; further, said Estep informed your affiant that he represented James Miller in all matters concerning his use as a state witness;

That said Estep further informed your affiant that he represented said Miller gratuitously, that he was presently the paid attorney for Milton Rhinehart in two civil matters and that at one time he was the attorney for said Rhinehart in the criminal case for which said Miller is a witness;

Further your affiant saith not.

agreed to appear with Miller in the Deputy Prosecutor's office, and that the attorney alone thereafter appeared saying he was advised Miller had left town and that he was unable to locate him. With the disappearance of the witness Miller, the King County Prosecuting Attorney's office decided a retrial of the case was not feasible.

II

ARGUMENT OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

At the outset, respondent respectfully submits that the considerations governing review on certiorari are not present in this application, and consequently the cause should not be reviewed by this Court and the Petition for Writ of Certiorari should be denied. See Rules of the Supreme Court, Rule 19. See also this Court's recent affirmation of the abstention doctrine in *Younger v. Harris*, ... US ....., 27 L.Ed. 2d 669, 91 S.Ct. ..... (February 23, 1971); and *Samuels v. Mackell*, and *Fernandez v. Mackell*, ... US ....., 27 L.Ed.2d 688, 91 S.Ct. ..... (February 23, 1971).

Without retreating from this position, respondent will address itself to and endeavor to answer the various factual contentions and legal arguments contained in petitioner's brief in support of his Petition for Writ of Certiorari.

A. THE DUE PROCESS ISSUE

Contrary to petitioner's assertions on pages 10 and 11 of his brief, the Deputy Prosecuting Attorney, who conducted the state court trial, had not seen the Juvenile Court records at the time of that trial, nor was he personnally aware of the evidence contained in those records (Rep. Tr., Vol. 2, pg. 281; and District Court Findings of Fact VIII, and Conclusion of Law III, petitioner's Appendix A-22 and A-23). The Deputy Prosecutor did not indicate that "he might even have had the Juvenile Court records at Rhinehart's trial", as alleged on page 11 of petitioner's brief, he merely was referring to a statement on a report by Police Officer Von Allmen (see footnote to page 11 of petitioner's brief).

Also, as to the availability of the Juvenile Court records to defense counsel, the Prosecuting Attorney at the state court trial, testified at the evidentiary hearing that a person seeking information from a Juvenile Court file could do so by way of motion presented to the Juvenile Court, and this would hold true for Mr. Rhinehart's defense counsel as well as for the Prosecuting Attorney's office (Rep. Tr., Vol. 2, 281 and 282). This assertion of the Deputy Prosecuting Attorney is borne out by the provisions of Washington State Statutes, RCW 13.04.230, which provide inter alia, "* * * such records shall be kept open to the inspection of the child, his parents, or guardians, or attorney, and to such other persons as may secure a special order of the court

therefor." The record of the District Court evidentiary hearing clearly shows that no effort was made by the defense counsel to secure the police and Juvenile Court reports despite the fact that the defense knew of witness Miller's involvement with the police and juvenile authorities (Rep. Tr., Vol. 3, 315).

Petitioner complains in several places about the use of the affidavit of Juvenile Parole Counselor Daniel M. Peyton (ROA, Vol. II, pgs. 174-177, with attachments). This was with reference to the detention of Miller at the Youth Center until proper home placement could be arranged by said Counselor, which was after the dismissal of the car prowling charges by the Juvenile Court judge on the basis of insufficient evidence. It should be pointed out that this affidavit specifically was made part of the record by the District Court at the evidentiary hearing (See Tr. of March 6, 1970, pg. 14).

Petitioner's argument on the due process issue is based on his contention that false testimony was knowingly used by the state during petitioner's criminal proceedings. This argument was rejected by the Ninth Circuit Court which held this simply was not so, stating:

> The circumstances of this case not only convince us that the testimony in question was not false but also that it was not, per the explicit findings of the district court, knowingly used by the state.

(See petitioner's Appendix A, pg. A-11).

The Ninth Circuit Court then proceeded to deal specifically with the areas of claimed false testimony, and rejected all of them for the reasons therein stated (see petitioner's Appendix A, pgs. A-11 to A-15).

It is respondent's position that this holding of the Ninth Circuit Court was correct in all respects, and that not only the testimony in question was not false, but also that all of these areas were substantially before the jury in proper perspective and that the jury had an opportunity to consider them and in fact did so in judging both the credibility and the weight which should be given to such testimony.

Petitioner's contentions with reference to these due process testimonial areas are set forth generally in his brief on pgs. 19 through 29, and will be responded to at this point by the respondent.

1. **The $15.00 Question**

Miller did not, as alleged by the petitioner, testify that he had with him at the time of his arrest the $15.00 allegedly given to him by Rhinehart. The testimony of Miller at the state court trial, on direct examination (St. pgs. 36-37) and on cross-examination (St. pg. 42), was that he first met petitioner Rhinehart about 1:00 a.m., the morning of April 11, 1965 (St. pg. 30), and returned to the downtown area approximately one-half hour later

(St. pg. 36). Miller met his two friends at that time and they went to the home of one of the friends so that he could get some money from his father. They returned downtown and stayed "in this one restaurant, goofed around there all night." (St. pg. 42). After this, and around 11:00 o'clock in the morning, they were picked up by the police on the car prowling incident, and this occurred "where the car was."

James Miller thus stated that he had the money with him when they came back into town after being out to John's (one of the friends) place, and that after that they stayed around all night in the restaurant and were not picked up by the police until 11:00 o'clock in the morning. This means that James Miller had a period of approximately ten hours within which to dispose of part of the money, and this would be relatively easy to accomplish since they spent most of the time in a restaurant in downtown Seattle. At no time, did James Miller testify that he had the $15.00 intact at the time of his arrest by the Seattle Police officers. Under these circumstances, it is our position that the production of the property card at the time of trial would not have changed the results in any manner whatsoever, nor would this be a vehicle of any import with which to test the credibility of the witness Miller.

2. **The Car Prowling Incident**

There is no evidence to support this assertion that Miller testified falsely concerning his activities

in the car prowling incident when he was arrested by the police. The fact that Miller was a companion in a car prowling venture was clearly before the jury, and Miller's version is borne out by the fact that the Juvenile Court judge dismissed the car prowling charges against him due to insufficient evidence (see Statement of the Case above and St. pg. 89).

Here again, the total picture of Miller's credibility was already so substantially in question before the jury, that this additional information would not have changed the result. See Ninth Circuit Court's statement in its footnote 28, appearing in petitioner's Appendix A at pg. A-19, as follows:

> This is not a case where the witness' credibility was not previously questioned. The jury was aware that Miller had been in trouble with the police. They were also informed that he had once retracted his statement implicating Rhinehart in an act of sodomy (and then reaffirmed it) prior to trial. Defense counsel described Miller as "incorrigible at this point, a complete and utterly depraved child and an opportunist who seized on this particular opportunity to implicate somebody here for his own benefit." The prosecutor agreed with this analysis and told the jury that Miller was "essentially an amoral (sic) individual; and I'm not sure that if Mr. Miller had anything to gain by it he wouldn't lie."

3. **Officer Von Allmen's Testimony**

Contrary to petitioner's assertions, Officer Von

Allmen actually stated that he did not know of *any incident* of solicitation by him (Miller) for immoral acts, in other words that he had no direct personal knowledge of Miller's having solicited homosexuals (St. pg. 120). As pointed out by the Ninth Circuit Court (petitioner's Appendix A, pg. A-14),

> The record shows that Von Allmen has twice testified under oath that he had no direct personal knowledge of Miller having solicited homosexuals. The unsworn cryptic statement in his police department report (and the juvenile report setting forth his suspicions) do not make this testimony false. He may have had suspicions but no knowledge of specific incidents.

Further, on the same page of said Ninth Circuit Court of Appeals' Opinion, the court pointed out that this aspect, dealing with Miller's credibility, was clearly before the trial court jury by the direct testimony of a defense witness, McClure, who testified that he had been propositioned by Miller a month prior to the alleged Rhinehart incident (St. 167-184).

4. **The Timing of Miller's Statements to the Police Question**

Contrary to petitioner's assertions under this subhead, Miller did not testify that the only police officer he had talked to about the alleged act was Officer Von Allmen on April 13. Instead, Miller testified on direct examination before the jury as follows (St. pgs. 36-37):

Q And then what occurred after you got downtown, did you get involved in this other thing with the prowling of cars?
A Yes
Q And it was after you were picked up on that you did tell the investigating *officers* about *this* event? (Emphasis supplied)
A Yes
Q Subsequently did you take anyone to this place where the Reverend Rhinehart had taken you?
A Yes
Q Who would that be?
A Officer Von Allmen.

And on cross-examination, Miller further testified as follows (St. pages 54-55):

Q Let me ask you, Jim, did you not make a statement to some police officers shortly after your arrest?
A Yes
Q And to whom was that made?
A I don't--I can't recollect his name. It was down at the police station.
Q It was a police officer?
A Yes
Q Not Von Allmen?
A No, it wasn't.
Q Did that police officer, whatever his name is, talk to you at all about Mr. Rhinehart and his TV program?
A They never even knew nothing about Mr. Rhinehart then.
Q Who was it that showed you the TV Guide with the ad on it?

A Officer Von Allmen.
Q When did he do that?
A Two days after I got in the Youth Center, after I went to court.
Q That was the first you knew about it?
A Yes

Thus it is seen that Miller testified shortly after his arrest that he talked to police officers, that he told them about *this* event, and that the identity of petitioner Rhinehart was unknown to Miller at that time and until he was shown the TV guide in his conversations with Officer Von Allmen some two days later.

The next part of this subhead, and the contentions contained therein, have been covered and answered in the factual statement of this case wherein it is shown that the records reflect that the Juvenile Court judge, on April 12, 1965, dismissed the charges against Miller relating to car prowling because of insufficient evidence, but Miller was detained at the request of his Juvenile Parole Counselor until April 15 in order that proper home placement could be arranged for Miller. The order set forth in petitioner's brief on page 22 corroborates and bears this out.

5. Miller's Testimony and the Prosecutor's Argument Relative to Miller's Detention

Miller did not testify nor did the Deputy Prosecutor argue that Miller was in Cascadia as a result of a court hearing. Miller testified before the jury concerning his detention in the manner outlined in

the above statement of the case, and further testified that he was still detained and in custody, even after the Juvenile Court hearing, and that he was in this custodial status when Officer Von Allmen came to see him and took the statement from him (St. pg. 89).

The Deputy Prosecutor, in his opening argument, told the jury that Miller was then (that is at the time of the trial) "in confinement in Cascadia Youth Camp." The Deputy Prosecutor's said nothing about how Miller got to Cascadia, nor why he was confined there (See St. pg. 230).

The Deputy Prosecutor's statement to the jury about the judge and not the police determining Miller's fate came during the state's rebuttal argument and was solely with reference to the events occuring on April 12 before the Juvenile Court judge when Miller was first placed in juvenile detention after his arrest (St. pgs. 247 and 248). This was entirely accurate, and further, the Deputy Prosecutor correctly advised the jury that Miller was still in juvenile detention when Police Officer Von Allmen interviewed him and took the first statement from him.

Respondent submits that Miller's testimony and the Deputy Prosecutor's argument in this area were entirely accurate and correct, and the jury was in no way misled.

6. **The Peyton Affidavit**

This question, and the contentions with refer-

ence to the same, have been dealt with and covered above, and it has been pointed out that the District Court judge at the evidentiary hearing specifically made this affidavit a part of the record of said evidentiary hearing (See Tr. of March 6, 1970, at pg. 14). Also, as above pointed out this affidavit is in no way inconsistent with the order entered, but actually corroborates, explains and bears it out.

7. **Miller's Fifth Statement**

Nothing further need be said regarding this statement, or its contents, or the circumstances under which it was taken, since this is fully set forth and explained in the above statement of the case, as well as being dealt with in depth by the Ninth Circuit Court Opinion (See petitioner's Appendix A, pg. A-9).

(a) LEGAL ARGUMENT RELATIVE TO DUE PROCESS ISSUE

The Ninth Circuit Court Opinion (petitioner's Appendix A), as amended by an order filed in that Court on April 14, 1971, denying the Petition for Rehearing, stated:

> We reverse because we believe that the ruling of the district court poses a standard of state prosecutorial conduct which is unrealistic.,

citing *Lessard v. Dickson*, 394 F.2d 88 (9th Cir. 1968) and *Lee v. United States*, 388 F.2d 737 (9th Cir. 1968). In its Opinion, the Ninth Circuit Court discussed at length the effect of *Giles v. Maryland*,

386 U.S. 66, 17 L.Ed.2d 737, 87 S.Ct. 793 (1967), and distinguished that case from this case under consideration, saying as follows (see petitioner's Appendix A, pg. A-15):

> As we view *Giles*, the result was based in part upon prosecutorial knowledge of the reports involved there combined with complete frustration of defense efforts to obtain the information. Here, the district court explicitly found that the prosecutor was unaware of the police and juvenile reports and the record clearly shows a total lack of effort by the defense to secure these reports despite the fact that the defense was well aware of Miller's involvement with the police and juvenile authorities.

On the same page, the Ninth Circuit Court further observed that *Giles* specifically declined to decide "whether the prosecution's constitutional duty to disclose extends to all evidence admissible and useful to the defense, and the degree of prejudice which must be shown to make necessary a new trial."

In short, said the Ninth Circuit Court Opinion (Petitioner's Appendix A, pg. A-16) "this is not a case like *Giles* where the defense theory (consent), if believed would have resulted in an acquittal. Rather this information would have been helpful only to the extent that it impeached the testimony of Miller and further questioned his credibility. The credibility of Miller was already so substantially in question that we cannot believe that this additional

information would have altered the result." (the Court's footnote No. 28 in connection with this, appears in petitioner's Appendix A, on page A-19, and is set forth verbatim above).

The Ninth Circuit Court, in its Opinion, also examined and distinguished from this case those cases dealing with this question decided prior to *Giles* (see petitioner's Appendix A-11 and footnote at A-18). Respondent, at this point, makes brief reference to those cases to point up how clearly the same are distinguished from this case.

For instance, in *Mooney v. Holohan*, 294 U.S. 103, 79 L.Ed. 791, 55 S.Ct. 340 (1935), the contention was with reference to the knowing use of perjured testimony by the prosecuting attorney and the deliberate suppression of evidence which would have refuted the testimony given against the defendant. Likewise, also distinguished from our case, is *Alcorta v. Texas*, 355 U.S. 28, 2 L.Ed.2d 9, 78 S.Ct. 103 (1957), which reasserted the *Holohan* ruling, in a situation where the state allowed testimony to stand knowing the same to be false. In *Napue v. Illinois*, 360 U.S. 264, 3 L.Ed.2d 1217, 79 S.Ct. 1173 (1959), the state attorney, although not soliciting false evidence, allowed it to go uncorrected when it appeared. This was where the witness testified that no promise had been made to him of consideration in return for his testimony, whereas actually such a promise had been made to the witness by the state attorney. This is an entirely different situation from

the one obtaining in our case. Also clearly distinguishable is *Miller* v. *Pate*, 386 U.S. 1, 17 L.Ed.2d 690, 87 S.Ct. 785 (1967), where the prosecutor knew at the time of the trial that it was paint, instead of blood, on the shorts of the victim, and the prosecutor allowed the conviction to be obtained by the knowing use of this false evidence. Finally, *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963), involved an actual suppression by the prosecuting attorney of evidence favorable to the accused (the confession of the co-defendant that he actually committed the homicide), even though this evidence had been requested by defendant's counsel prior to trial. Once again, this is clearly a different situation from the one in our case.

For the above reasons, respondent respectfully submits that the Ninth Circuit Court was entirely correct and should be affirmed in its holding on this due process issue.

B. THE EQUAL PROTECTION ISSUE

Pursuant to the remand directions of the Ninth Circuit Court in *Rhinehart v. Rhay*, 409 F.2d 208 (1969), the District Court did hold such an evidentiary hearing in Seattle, Washington, on November 5, 6 and 7, 1969, at which hearing the District Court judge dealt with the equal protection issue pursuant to said remand directions.

Petitioner's principal contention in this area is

that he was denied equal protection because he was singled out for prosecution under the Washington State Sodomy Statute (RCW 9.79.100, see petitioner's Appendix D, pgs. A-26 to A-27). Petitioner also contends that in arresting petitioner the police were motivated by reasons other than the violation of the Sodomy Statute.

The District Court, at the evidentiary hearing, rejected these contentions of petitioner and held that the petitioner was not denied equal protection of the laws, and with this holding the Ninth Circuit Court agreed and affirmed (see petitioner's Appendix A, pgs. A-16 to A-17).

Contrary to petitioner's assertion in his brief before this court (pgs. 41 and 42) that the District Court refused to permit him to put on evidence on his equal protection contention, the District Court, during the three day hearing in November, 1969, heard several of the witnesses called by petitioner on this equal protection issue, considered 105 files of the King County Prosecuting Attorney involving prosecutions of sodomy in the City of Seattle immediately prior to the prosecution of petitioner, and received and heard an extensive offer of proof in open court on the equal protection aspect of this case presented by petitioner's counsel (see pgs. 390 to 405, Rep. Tr., Vol. 3).

In finding that petitioner had not established that his constitutional rights were violated with re-

spect to his claim of denial of equal protection of the laws, and concluding that petitioner's application for a writ of habeas corpus on that ground should be denied, the District Court considered this issue in depth and and made an extensive oral ruling on the same at the time of the evidentiary hearing (see Rep. Tr., Vol. 3, pgs. 374 and 375, and pgs. 405 to 409). In that Opinion, the District Court found that the offer of proof, even if established, would not constitute a constitutional deprivation of equal protection within the cognizance of the federal court, the court noted that there had been 105 prosecutions of sodomy in the City of Seattle immediately prior to the prosecution of the petitioner, and that there had been prosecutions of some 58 or more people who were accused of engaging in illicit sexual activity with young people. Under these circumstances, the District Court distinguished our case from *Yick Wo v. Hopkins*, 118 U.S. 356, 30 L.Ed. 220, 6 S.Ct. 1064 (1886), and stated that this was not a *Yick Wo v. Hopkins* situation at all. With this conclusion, the Ninth Circuit Court completely agreed (see petitioner's Appendix A, pgs. A-16 and A-17). Respondent submits that these rulings are correct and proper and should be sustained.

Respondent also would submit that the *McLaughlin* case relied upon by the petitioner (see petitioner's brief pg. 39) is not in point nor controlling of the situation existing in our case (*McLaughlin vs Florida*, 397 U.S. 184, 13 L.Ed.2d 222,

85 S.Ct. 283, 1964). In the *McLaughlin* case, this court struck down the offending Flordia statute as showing an invidious discrimination on its face since it singled out promiscuous interracial couples for special statutory treatment. This is not the situation in the *Rhinehart* case.

C. THE CONSTITUTIONALLY PROTECTED ZONES OF PRIVACY ISSUE

This issue is raised in petitioner's Question D, commencing on page 42 of petitioner's brief. In support of his argument in this area, petitioner relies primarily on the case of *Griswold v. Connecticut*, 381 U.S. 479, 14 L.Ed.2d 510, 85 S.Ct. 1678 (1965).

Respondent respectfully submits that *Griswold* is not applicable to the present situation. *Griswold* dealt with the marriage relationship and the rights of privacy inherent therein and "nothing in the present case resembles a right of privacy in marriage." (see *Smayda v. United States*, 352 F.2d 251 (CA 9th, 1965)).

Petitioner's contention that the Washington sodomy statute is invalid because the same might be applied against parties to a marriage is without merit since petitioner does not have standing to raise the constitutional rights of married people who may engage in conduct prohibited by the said sodomy statute, RCW 9.79.100. Here there is no "case or controversy" involving the rights of married persons and petitioner does not have an interest therein

nor is he affected thereby, in other words, this case as far as married persons are concerned presents no justiciable controversy. This also was recognized in the case cited by petitioner, *Buchanan v. Batchelor* 308 F. Supp. 729 (1970), where that court specifically questioned the standing of plaintiff *Buchanan* to raise the constitutional rights of married persons committing acts of sodomy. However, with reference to the authority ascribed to *Buchanan* by the petitioner, it would seem that Buchanan has no precedential value at this point since the appeal of that case to this court has been vacated and remanded to the United States District Court for the Northern District of Texas for reconsideration in light of *Younger v. Harris, supra,* and *Samuels v. Mackell* and *Fernandez v. Mackell, supra,* (Journal of Proceedings of the United States Supreme Court, March 29, 1971, Docket Nos. 289 and 290, 8 Cr. L. 4196). Hence the issue concerning the constitutionality of the sodomy statute of the State of Texas is not before this court in the said cases of *Wade v. Buchanan,* Docket No. 289, and *Buchanan v. Wade,* Docket No. 290.

Respondent also submits that petitioner's "police power" argument with respect to the statute in question also is without merit. Here the Washington State Legislature determined in its discretion that the mores of the community and the public morals and interest required the protection afforded by the act in question, RCW 9.79.100, whether consented

to or not. This was within the province of the legislature alone, and a state of facts and the public interest existed which justified the legislation. It has long been recognized that:

> In the exercise of police power, the legislature is vested with a wide discretion not only to determine what the public interest requires, but also to adopt measures necessary for such protection.

(McDermott v. State, 197 Wash. 79, 84 P.2d 372 (1938), pg. 83). This right of a state to so regulate such matters was recognized by this court in the *Griswold* case itself where Mr. Justice Goldberg, in his concurring opinion, appearing on pages 489 and 499 of that decision stated:

> Finally, it should be said of the Court's holding today that it in no way interferes with a state's proper regulation of sexual promiscuity or misconduct. As my Brother Harlan so well stated in his dissenting opinion in *Poe v. Ullman*, *supra*, 367 US at 553, 6 L.Ed.2d at 1025.
>
> > 'Adultery, homosexuality and the like are sexual intimacies which the State forbids . . . but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow but which always and in every age it has fostered and protected.'

This court went on to indicate in *Griswold*, that Connecticut encountered its trouble when, having acknowledged the institution of marriage and the

intimacies therein, it undertook to regulate the details of that intimacy by means of criminal law. The clear distinction between that situation and the one now before this court is at once apparent. Clearly, as pointed out by this Court, the enactment of criminal laws relating to sexual misconduct, including the crime of sodomy, comes well within the police power of the state of Washington.

D. THE VAGUENESS QUESTION

This issue is raised by petitioner's Question E, commencing on page 48 of his brief. Respondent submits that petitioner's argument under this question is not valid and his contention is without merit.

What the court has required is that men of common intelligence must have adequate warning and notice of what the statute describes as a prohibited act. RCW 9.79.100 specifies the acts necessary for the crime in its statutory body and is not indefinite and void under the vagueness doctrine. The petitioner had adequate warning under the statutory language embraced in the act in question. The statute gives fair notice of what acts will be punished, and it specifically delineates ascertainable standards of guilt, so that men of reasonable understanding are not required to guess at the meaning of the staute. See *Winters v. New York*, 333 U.S. 507, 92 L.Ed. 840, 68 S.Ct. 665 (1948).

E. THE FREEDOM OF RELIGION ISSUE

This issue is raised under petitioner's Question F, commencing on page 50 of his brief.

The main thrust of petitioner's argument seems to be his contention that RCW 9.79.100 is based upon proscriptions contained in early religions, and therefore the statute represents an unconstitutional legislative establishment of religion, and the State has failed to show a proper secular legislative purpose for the statute. Respondent submits this argument is not valid and the contention is without merit.

Petitioner relies upon the case of *McGowan v. Maryland*, 366 U.S. 420, 6 L.Ed.2d 393, 81 S.Ct. 1101 (1961). However, that case specifically recognizes that the scope of religious freedom is in fact limited by the principle that the practice of religion may be made to conform to generally prevailing conceptions of the general safety, morals, and welfare of the community, even though those conceptions may have been determined in part by the tenets of some other religion. See *McGowan v. Maryland* at page 442 where this language appears:

> However, it is equally true that the "Establishment" Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions. In many instances, the Congress or state legislatures conclude that the general welfare of society, wholly apart from any religious considerations, demands such regulation. Thus, for temporal purposes, murder is illegal. And the fact that this agrees with the dictates of the Judaeo-Christian religions while it may disagree with others does

not invalidate the regulations. So too with the questions of adultery and polygamy. *Davis v Beason*, 133 US 333, 33 L ed 637, 10 S Ct. 299; *Reynolds v. United States*, 98 US 145, 25 L ed 244, *supra*. The same could be said of theft, fraud, etc., because those offenses were also proscribed in the Decalogue.

The cited case of *Reynolds v. United States*, 98 U.S. 145, 25 L.Ed 244 (1878), dealt with the question of polygamy and held a statute prohibiting that practice constitutional even though it applied to a member of the Morman faith. On page 166 of that opinion the following appears:

> Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.

Likewise, in the cited case of *Davis v. Beason*, 133 US 333, 33 L.Ed. 637, 10 S. Ct. 299 (1890), this principle was again reiterated on page 345 of the Opinion:

> Whilst legislation for the establishment of a religion is forbidden, and its free exercise permitted, it does not follow that everthing which may be so called can be tolerated. Crime is not the less odious because sanctioned by what any particular sect may designate as a religion.

This principle was recognized and stated by the Honorable William N. Goodwin, United States District Judge, in his Order dated April 19, 1968, which denied petitioner's application for a writ of habeas corpus (Tr. 18 - 21), as follows:

> The court finds that the First Amendment's guarantees of freedom of religion do not encompass the practice of homosexuality any more than they contemplate the practice of polygamy or the use of narcotics.

Respondent submits therefore, that RCW 9.79-.100, which concerns itself with the sexual crime of sodomy, was constitutionally applied to the petitioner herein.

III

CONCLUSION

For the foregoing reasons, respondent respectfully submits that this Cause should not be reviewed by this Court, and that the petition for writ of certiorari should be denied.

Respectfully submitted,

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